

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSEPH M. PELTON,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

CASE NO. C06-5389RBL-KLS

ORDER TO SHOW CAUSE
REGARDING MEDICAL
EXPERT TESTIMONY

Plaintiff, Joseph M. Pelton, has brought this matter for judicial review of the denial of his applications for disability insurance and supplemental security income benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the Court hereby orders as follows:

In her opening brief, plaintiff asserts the record is incomplete as it does not include the hearing testimony of the medical expert, Sally Clayton, Ph.D., called to testify by the administrative law judge ("ALJ"). Plaintiff also moves in her opening brief to compel defendant to produce the transcript of this

1 testimony and to allow supplemental briefing to address it, or, if such a transcript is unavailable, to remand
2 this matter for a new hearing. While plaintiff has not properly noted his motion to compel, nevertheless, the
3 undersigned finds that although it appears Dr. Clayton did testify (see Tr. 21), no such transcript of that
4 testimony is included in the record.

5 Defendant has not responded to plaintiff's motion or the issue of the missing testimony. However,
6 its absence is not harmless, as it appears to have been substantive in nature, and the ALJ relied on it to a
7 fairly large extent in making his disability determination:

8 The impartial medical expert, Dr. Clayton, following her review of all the medical
9 evidence of record opined that the claimant suffers from substance induced mood
10 disorder versus major depression and anti-social passive/aggressive personality disorder.
11 She also noted the claimant's acknowledged ongoing consumption of alcohol
12 characterized as "not everyday." Dr. Clayton opined that his low mood probably is
mildly worsened secondary to consumption of alcohol, a known depressant agent. She
further noted however that his personality disorder features were unchanged by his
alcohol consumption. She specifically stated that his personality disorder features were
longstanding and likely permanent in his nature.

13 In conclusion, Dr. Clayton opined that the claimant's alcohol abuse was not material in
14 the overall nature and severity of his mood and personality disorders. Dr. Clayton
15 concluded that he [sic] claimant's combined impairments under listings 12.04 and 12.08,
16 absent drug and alcohol abuse, while considered in combination with his alleged back
pain, were not such severity as to meet or medically equal any impairments listed in the
regulations . . . I concur with Dr. Clayton's opinion, finding her opinion is both
supported by and consistent with the substantial and medical evidence of record . . .

17 Id. Without the ability to review that testimony, furthermore, the Court is unable to determine if the ALJ's
18 evaluation of it was proper – which is particularly important in light of the fact that plaintiff is challenging
19 the ALJ's evaluation of the medical evidence in the record – and thus unable to properly determine whether
20 the ALJ's overall disability determination itself should be upheld.

21 Accordingly, defendant hereby is ordered to supplement the record by filing a copy of the transcript
22 containing Dr. Clayton's testimony by **no later than June 24, 2007**, or show cause why this matter should
23 not be remanded for further administrative proceedings, including a new hearing to obtain the testimony of
24 Dr. Clayton or, if she is unavailable, other medical expert testimony deemed necessary by the ALJ. If
25 defendant does so supplement the record by the above date, the Court shall set new briefing deadlines to
26 allow for supplemental briefing to address Dr. Clayton's testimony. Failure of defendant to timely respond
27 to this order shall result in a recommendation that this matter be remanded for further administrative
28 proceedings as noted above, including a new hearing.

1 The Clerk shall send a copy of this Order to counsel for plaintiff and counsel for defendant.

2 DATED this 24th day of May, 2007.

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5 Karen L. Strombom
6 United States Magistrate Judge
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